IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL UNDER ESI NO.15/2006

Employees State Insurance Corporation,
through its Deputy Regional Director,
Panchadeep Bhavan, EDC Plot No.23,
Patto, Panaji, Goa. ..... Appellant.

V/s.

1. M/s. New Era Shipping Co. Ltd.,
   2, First Flor, Dr. Mukund Building,
   F.L. Gomes Road,
   Vasco da Gama, Goa.
2. Shree V. G. Jadhav,
   son of Shree G. Jadhav,
   Indian National, aged 73 years,
   Director of M/s. New Era Shipping Co. Ltd.,
   2, First Flor, Dr. Mukund Building,
   F.L. Gomes Road,
   Vasco da Gama, Goa. ..... Respondents.

Mrs. A. A. Agni and Mr. M. P. Dessai, Advocates for the appellant.

Miss Rajani Kamath, Advocate for the respondents.

CORAM : P.V. KAKADE, J.

DATE : 14TH NOVEMBER, 2006.

ORAL JUDGMENT :

Heard learned Counsel for both the parties. Rule. Rule made returnable by consent forthwith.

2. The appellant-Employees State Insurance Corporation has taken exception to the Judgment and Order passed by the District Judge, South Goa, Margao who was presiding as the E.S.I. Judge, whereby the respondents' application under Section 75 of the Employees' State Insurance Act, 1948 (hereinafter, called as the “said Act”), came to be allowed.

3. Respondent No.1 is a limited Company and it was a private company named as “M/s. New Era Barges Pvt. Ltd.”. With effect from 17.6.2003, it was converted into a public limited company and named as “M/s. New Era Shipping Co. Ltd.” Respondent No.2 is the director thereof. The said company owned and operated barges for hire. The service rendered in such operations consisted of transportation of cargo from loading points to the ships or transhippers in the sea. The said operations were carried on within the operational area of ports. When barges were plied in Goa, the operations were carried out in the territorial limits of Mormugao Port and when the barges were hired to the agencies outside Goa, the operations were carried out within the operational areas of other ports. The operations of the respondents were not confined to Goa. Their barges plied at different ports like Navalakhi, Dharamter, etc.. The respondents' barges are shifted to Ports outside Goa when no occupation is

available in Goa and at some ports like Navalakhi, ESI medical facilities are not even available. The barge crew of respondent No.1 are governed by Port and Dock Workers' Regulation Act. In the matter of service conditions and other allied matters, the barge crew are members of trade union called “United Bargemen's Association”. The respondent No.1 is a member of Goa Barge Owners' Association, which has entered into a settlement with the Goa Bargemen's Association whereunder the terms of employment of the barge crew are agreed.

On 23.6.1998, the Insurance Inspector of the appellant visited the office of respondents and called for information about the number of employees employed. On 21.8.1998, respondent No.1 furnished information regarding its business. Soon thereafter, on 10.9.1998, the appellant informed the present respondents that the respondents were covered under Section 1(5) of the said Act with effect from 1.6.1998. On 18.2.1999, the appellant issued notice in Form C-18 calling upon the respondents to pay a sum of Rs.26,956/- towards E.S.I. Contribution pertaining to the period from 1.6.1998 to 30.9.1998 assessed by the appellant. On 30.4.2001, the appellant issued second notice in Form C-18, calling upon the respondents to make payment of Rs.1,61,733/- towards E.S.I. contribution pertaining to the period from 1.10.1998 to 30.9.2000. On 26.7.2002, the appellant issued third notice calling upon

the respondents to make payment of Rs.80,867/- towards E.S.I. contribution pertaining to the period from 1.10.2000 to 30.9.2001. In response to the said notice, the case was sought to be made out on behalf of the present respondents that the said Act was not applicable to them and, therefore, the question of making any payment towards the E.S.I. contribution would not arise. The respondents sought to make out a specific case that they did not and do not have more than 10 employees, and each drawing monthly wages of less than Rs.6500/- and as such, they are not covered by the said Act. It was further submitted that there was no effective notification issued by the Appropriate Government extending the provisions of the said Act to the establishment of the respondents and further it was submitted that the employees of the respondents were governed the Port and Dock Workers' Regulation Act and as such, the said Act was not applicable to the respondents.

4. On the basis of these aspects, written statement was filed before the lower Court resisting the claim of the present respondent, submitting that the respondents herein were not governed by the provisions of the said Act. It was also submitted on behalf of the present appellant that the respondents' establishment was covered under the said Act with effect from 1.6.1998. The learned ESI Judge, after hearing both

the parties, came to the conclusion that the respondents-applicants had proved that they did not have employees more than 10 in number, each drawing monthly wages of less than 6500/- and, therefore, the establishment of the respondents was not covered under the said Act. It was further held that there was no effective notification issued by the Appropriate Government under the said Act and, as such, the application came to be allowed and the impugned order passed by the present appellant came to be set aside. Hence, the present appeal.

5. The learned Counsel for the appellant sought to raise substantial questions of law to the effect that whether the Notification dated 30.6.77 bearing No.1/486/75 covered the establishment of the respondents and the finding of the E.I. Court on issue No.3 was illegal and opposed to law. The next question was sought to be raised to the effect that whether the decision on issue of coverage was vitiated in law as the finding of fact is to the effect that the present respondents engaged more than 29 workers and the issue No.2 was answered against the present respondents and, therefore, the lower Court erred in law.

6. In this regard, on perusal of the Judgment of the lower Court vis a vis the record, it is seen that the lower Court has observed that there

is no evidence on record to show that more than 10 employees were drawing less than Rs.6,500/- as wages per month; the salary records produced by the present respondents showed that the salary of the floating staff was more than Rs.6500/- and this being the position, it was held that the respondents proved that they had not employed more than 10 employees, each drawing monthly wages less than Rs.6500/- and, therefore, it was held that it followed that the respondents' establishment was not covered under the said Act.

7. Now the learned Counsel for the appellant submitted that the records were conspicuous by the absence of any voucher in respect of salary paid to the concerned employees, in order to hold that the employees, in question, were drawing salary of more than Rs.6500/- per month. The vouchers which were produced were not of present respondents, but were of different establishment and, therefore, the finding recorded by the lower Court was not supported by the evidence on record. However, it is brought to my notice that computerized slips of salary record is indeed produced on record, on which basis, it appears that the lower Court has relied upon and has drawn the conclusion as noted earlier. Therefore, I do not see any reason why this Court should go into the aspect of reappreciation of the documentary evidence and, therefore,

I accept the finding recorded by the lower Court on this issue.

8. So far as issue relating to the applicability of the provision in question is concerned, the lower Court has observed that admittedly, there is no effective notification issued by the Appropriate Government extending the provision of the said Act to the establishment of the respondents. No doubt, there is no record to be seen that it was an admitted position, however, the learned Counsel brought to my notice the Notification No. 1/486/75 dated 21.6.77 stating that there was Notification which would cover the establishment involved in this case and it amounted to "shop" within Item No.3, clause (iii) thereof. However, it is also evident that this aspect was not raised before the E.I. Court, nor was argued at all. In fact, it was necessary for the present appellant to bring to the notice of the E. I. Court the said notification dated 21.6.1977 in order to canvas the argument that it was applicable to the present establishment which is involved in this case. But it was not so done. Under the circumstances, in my considered view, this aspect cannot be allowed to be raised for the first time in this appeal which is in fact a second appeal in letter and spirit. This is obviously so because the other side was deprived of meeting with such argument before the E.I. Court and, therefore, I hold that the appellant cannot be allowed to raise this argument for the first

time in this appeal.

9. In the result, I do not see any reason to hold that the findings recorded by the E.I. Court are inappropriate or perverse in any manner and I am satisfied that the reasoning adopted and the findings recorded by the E.I. Court appear to be just, legal, proper and would brook no interference. In the result, the appeal has no merit and stands dismissed with no order as to costs.

P.V. KAKADE, J.

ssm.